



OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

December 12, 2000

William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Amendment of the Commission's Rules With Regard to the 3650-3700
MHz Government Transfer Band: ET Dkt. No. 98-237; FCC 00-363

Dear Chairman Kennard:

In late October of this year, my staff and I accepted an invitation to address high ranking FCC staff members, on the occasion of their weekly meeting, regarding the FCC's compliance with the Regulatory Flexibility Act (RFA).¹ We greatly appreciated the opportunity to address the agency in this manner and in this unusual setting.

At the meeting, we urged the FCC staff to consider the impact of new rules early in the rulemaking process, at the stage when policymakers consider the substance of a proposed rule. We explained that the FCC proposals tend to contain shallow regulatory flexibility analyses which offer no substantive discussion of a rule's impact on small business and offer no real alternatives that would minimize that impact while serving the agency's goals. It appears the agency prepares regulatory flexibility analyses after it has developed its policy objectives and proposals.

The *final* regulatory flexibility analysis prepared in conjunction with the above-referenced proceeding is but another example of the FCC's failure to comply with RFA. In this rulemaking, the agency acted to allocate 50 MHz of spectrum to fixed and mobile terrestrial services on a primary basis in order to facilitate the provision of a broad range of advanced services, particularly to under-served rural areas of the United States. The FCC adopted final rules on October 12, 2000.

The FCC's final regulatory flexibility analysis is inadequate in this case. It fails to describe what steps the agency took to minimize the rule's significant economic impact on small entities, consistent with the agency's regulatory goals. The analysis makes no mention "of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule", and does not indicate whether the FCC considered but rejected any significant alternatives that would minimize adverse impact on small entities.² In fact, the FCC offers no discussion of any alternatives:

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.).

² See 5 U.S.C. § 604(a)(5).

No petition for rule making was filed to initiate this proceeding and there are no comments in this proceeding that suggest alternatives to the adopted allocation. We requested comment on alternatives that might minimize the amount of economic impact on small entities and no alternatives were offered.³

As the expert agency, the FCC bears the responsibility under RFA to identify alternatives to its proposals. But the FCC failed to do this. Instead, it asked the public to suggest alternatives. The FCC repeatedly takes this approach, in effect abdicating its responsibility under RFA.

Mr. Chairman, the Office of Advocacy has made this very point repeatedly over the past year and in years past. The modus operandi at the staff level will only change if there is direction from the top. Staff must prepare substantive analyses that discuss the impact of proposed and final rules on small business and also explore alternative ways to accomplish the FCC's goals while minimizing impacts. Staff should consider small business impacts as they formulate substantive proposals. In this way, the FCC may move away from the shallow cut-and-paste analyses it typically offers.

Respectfully submitted,

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cc: Commissioner Susan Ness
Commissioner Harold W. Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Secretary Magalie R. Salas
Thomas J. Sugrue
Dale Hatfield
Anthony Bush

³ Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band, First Report and Order and Second Notice of Proposed Rulemaking, ET Dkt. No. 98-237, FCC 00-363, released October 24, 2000, Appendix B, p. 61.